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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC. and RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF STATE OF WASHINGTON and NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,
Respondents.

[redacted] THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION [redacted] BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA), pursuant to Rule 42 of the Rules of this Court, moves for leave to file the accompanying brief as amicus curiae in support of the petitioners. The petitioners and the respondents, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, have consented in writing to this brief. The respondent Department of Game of State of Washington has refused to consent.

The petitioners have questioned whether a state court, or any state agency, may regulate treaty fishing rights exercised by members of the Puyallup Tribe while on their reservation. NTCA files this motion because of the enormous impact this Court's response will have on all federally recognized, reservation-based Indian tribes. We respectfully refer the Court to the statement of the interest of NTCA in the accompanying brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors, or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations also are eligible for membership. NTCA members all are leaders duly elected or appointed by

their people according to their tribal constitutions or governing instruments. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA. The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA declares it its purpose, among other things, to ensure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not impaired or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

Thus NTCA has a clear and vital interest in the *Puyallup* litigation. In *Puyallup III*, the Supreme Court of Washington has held that it and other state instrumentalities have the power to regulate the exercise of treaty fishing rights by members of the Puyallup Tribe while on their reservation. *Department of Game v. Puyallup Tribe, Inc.*, 86 Wash. 2d 664, 548 P.2d 1058, 1063-64 (1976). As a spokesman and representative for the reservation-based and federally recognized Indian tribes of this country, NTCA must challenge vigorously such an affront to Indian tribal sovereignty, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-61 (1832), and to the unique trust relationship between the federal government and the Indian people, *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), both of which this and other courts have consistently recognized and respected, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U.N.Mex. 1971). Every

one of NTCA's members, all leaders of federally recognized tribes, will be directly affected by this Court's decision in *Puyallup III*.

Petitioners, appropriately, have emphasized and will emphasize the peculiar facts associated with this litigation. NTCA, however, as a collective voice of Indian leadership in this country, stands in a unique position to present the Court with the broad ramifications inherent in the decision to be reached. All Indian tribes, all Indian people will be touched. Their voices should be heard. NTCA is the vehicle for this necessary communication.

ARGUMENT

That state laws have no effect upon Indians within an Indian reservation was settled by this Court 145 years ago in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There, Chief Justice Marshall wrote:

> The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

Id. at 561. Although this basic principle consistently has been followed by this Court, *Williams v. Lee*, 358 U.S. 217, 223 (1959), Mr. Felix Cohen, in his treatise on federal Indian law, warned that "many . . . state courts and state legislatures since [*Worcester*] have . . . refused to acknowledge the implications of the decision." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 116 (U.N.Mex. 1971). This, simply, is the crux of *Puy-*

allup III. The Supreme Court of the State of Washington has held that it and other state instrumentalities have the power to regulate treaty fishing rights exercised by members of the Puyallup Tribe while on their reservation. *Department of Game v. Puyallup Tribe, Inc.* 86 Wash. 2d 664, 548 P.2d 1058, 1063-64 (1976). The state has no such power. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 170-71 (1973); *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412 n.12 (1968).

The Puyallup Tribe is recognized by the federal government; it has adopted a tribal constitution, approved by the Secretary of the Interior, and is organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1970). The tribe is a functioning and viable entity, with an active Chairperson and Tribal Council. For example, the Puyallups employ a fishery biologist.

The Puyallup Indian Reservation, established by Article II of the Treaty of Medicine Creek, 10 Stat. 1132, 1132-33 (1854), continues to exist. *United States v. Washington,* 496 F.2d 620, 621 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974). Undisputed trial testimony establishes that the tribal fishery at issue occurs virtually entirely within the reservation. Petition for Certiorari, at 7-8.

The treaty provisions establishing the Puyallup reservation clearly preclude state interference with on-reservation tribal fishing. Article II provides that the reservation "shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent." 10 Stat. at 1132-33. This provision

must be interpreted liberally and as the Indians would have understood it. *Antoine v. Washington,* 420 U.S. 194, 200 (1975); *United States v. Winans,* 198 U.S. 371, 380-81 (1905). The Puyallups undoubtedly understood the right to put the reserved territory to their "exclusive use" to include unfettered control over their previously undisturbed fishing rights. *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-06 (1968); *Williams v. Lee,* 358 U.S. 217, 221-22 (1959); *United States v. Winans,* 198 U.S. 371, 381 (1905); *United States v. Washington,* 520 F.2d 676, 690 (9th Cir. 1975) *cert. denied,* 423 U.S. 1086 (1976); *Kimball v. Callahan,* 493 F.2d 564, 566 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974); *United States v. White,* 508 F.2d 453, 457 (8th Cir. 1974). Congress never has abrogated this treaty right to "exclusive use" of the on-reservation fishery. *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-13 (1968). This treaty right, therefore, remains the supreme law of the land and is binding upon the State of Washington. U.S. CONST. art. VI, cl.2; *Antoine v. Washington,* 420 U.S. 194, 201, 204, 205 (1975); *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412 n.12 (1968); *United States v. Washington,* 520 F.2d 676, 684, 685 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 117 (U.N.Mex. 1971).

Even were there no treaty provision guaranteeing the exclusive right of the tribe to fish within the reservation, application of the *Worcester* doctrine precludes state regulation of this activity. Resolution of jurisdictional disputes between a tribe and a state, absent a governing Act of Congress, turns upon whether the state action infringes upon treaty-protected reservation self-government. *Fisher v. District Court,* 424 U.S. 382 386 (1976); *Williams v. Lee,* 358 U.S. 217, 220 (1959).

Accordingly, states have been considered to be without power to enforce their fish and game laws on reservation activity. *Moore v. United States,* 157 F.2d 760, 763-64 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947). *See Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1962); *Tulee v. Washington,* 315 U.S. 681, 683 (1942). There can be no other conclusion under the *Williams* test. This Court long ago recognized the importance of fishing rights to the Washington tribes: They "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans,* 198 U.S. 371, 381 (1905). This truth still holds. The Puyallup economic base wholly is dependent upon a healthy tribal fishing industry. If the state has power to control the extent to which the tribe can fish, it has the power to control the extent to which tribal members can support themselves. Economic self-sufficiency is at the core of the tribe's power to manage its own affairs. There can be no self-government if the state has the power to destroy the tribe economically.

The Washington Supreme Court made no attempt to reconcile its assertion of power over the Puyallup reservation economy with the *Worcester-Williams* line of authority. Instead, the court interpreted this Court's remand in *Puyallup II, Department of Game of Washington v. Puyallup Tribe,* 414 U.S. 44, 49 (1973), as "expressly conferring jurisdiction in this matter in the state courts." *Department of Game v. Puyallup Tribe, Inc.,* 86 Wash.2d 664, 548 P.2d 1058, 1063 (1976). This misinterpretation of the *Puyallup II* remand cannot withstand analysis. In *Puyallup II,* this Court assumed it was dealing with state regulation of off-reservation treaty fishing rights. 414 U.S. at 45. This is not the case, for five months after this Court's *Puyallup II* decision, the Ninth Circuit affirmed that the Puyallup reservation still exists. *United States v. Washington,* 496 F.2d 620 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974). More importantly, however, the *Puyallup II* remand could not have been intended to confer jurisdiction on the state courts to regulate on-reservation fishing rights because this Court has always held that the power to confer such jurisdiction resides only in Congress. *Williams v. Lee,* 358 U.S. 217, 223 (1959); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-568 (1903). When Congress has wished a state to extend its power to Indian reservations, it expressly has granted the jurisdiction denied since *Worcester. Williams v. Lee,* 358 U.S. 217, 221 (1959). No federal statute authorizes the State of Washington's blatant interference with tribal self-government. *See Fisher v. District Court,* 424 U.S. 382, 388 (1976).

Once an Indian reservation has been established, it can be terminated only by an express Act of Congress. *Mattz v. Arnett,* 412 U.S. 481, 504-05 (1973); *United States v. Celestine,* 215 U.S. 278, 285 (1909). Thus the mere allotment of reservation land or the opening up of such land to white settlers does not abolish reservation status. *Mattz v. Arnett,* 412 U.S. 481, 497, 504-05 (1973); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 356 (1962); *United States v. Celestine,* 215 U.S. 278, 287 (1909). The special nature of an Indian reservation obtains even when the cause of action arises within the limits of a town incorporated under state law. *Kennerly v. District Court,* 400 U.S. 423 (1971) (town of Browning, Montana). This Court thus has made clear that no circumstances short of an express Act of Congress terminate Indian reservation status.

The State of Washington's request that this Court authorize it to control the on-reservation economic activity of the Puyallup Tribe is not novel. It is a request that this Court has denied for nearly 150 years. *Williams v. Lee*, 358 U.S. 217, 223 (1959). It is a request that runs counter to the congressional policy designed to foster and perfect tribal self-determination and tribal economic development. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975). The day states are allowed to regulate the manner in which Indian tribes support and govern themselves will be the day Indian tribes as distinct communities no longer exist. All Indian tribes, all Indian people will be injured if this Court allows the State of Washington to regulate the on-reservation tribal fishery of the Puyallup Tribe.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case with directions that all state regulation of Puyallup tribal, on-reservation fishing be voided.

Respectfully submitted,

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